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MEMORANDUM

Office of the City Manager



To: Honorable Mayor and Council
Through: Thomas J. Wilson, City Manager
From: Blair King, Assistant City Manager *BK*
Subject: Sidewalk Maintenance and Liability
Date: September 2, 2003

RECOMMENDATION:

Direct staff to draft a "sidewalk ordinance," consistent with California Streets and Highways Code, 1911 Act, to generally require abutting property owners to maintain sidewalks and to hold property owners responsible for third parties injured as a result of the property owner's failure to maintain sidewalks. As a companion to the ordinance, direct staff to prepare a policy that allows the City to continue to pay for sidewalk repairs of owner-occupied residential units.

ISSUE:

The State of California Streets and Highways Code, 1911 Act, stipulates that the owner of the fronting property is responsible for maintaining the sidewalk in good and non-hazardous condition. Milpitas, unlike many other California cities, does not require that individual property owners maintain the sidewalk abutting their property. Milpitas pays all the costs for sidewalk repairs and maintenance. Additionally, the City has not adopted sufficient language to make it clear that the City is not liable for third party injuries that result from the abutting property owner's failure to maintain the sidewalks. (Please see attached: City Attorney Memorandum, Subject: Sidewalk Maintenance Responsibility and Liability of Abutting Landowners, dated: June 24, 2003.) Milpitas could, through the adoption of an ordinance consistent with state law, reduce its sidewalk maintenance costs by requiring that property owners maintain sidewalks and could reduce its exposure to financial judgments related to claims for unsafe or dangerous sidewalks by adopting clear language transferring liability to the fronting property owner.

BACKGROUND:

Milpitas spends between \$175,000 to \$235,000 annually to maintain an estimated 200 miles of sidewalks. Funds to maintain sidewalks are annually appropriated by the City Council and are augmented through the use of funds allocated to other projects. Costs of maintaining sidewalks are increasing due to the increased age of sidewalks and associated infrastructure. The Public Works Department estimates that over the next five years the cost to repair sidewalks will increase faster than the rate of inflation.

California law states that fronting property owners are responsible for the maintenance and the care of sidewalks and provides procedures for adoption by local government to charge property owners sidewalk maintenance costs. This allows local governments to shift costs and utilize limited resources for other budgeted items. Both the cities of San Jose and Fremont have adopted sidewalk ordinances that require that the property owner maintain sidewalks.¹

Although the City of San Jose requires that property owners maintain sidewalks, it has a grant program to reimburse residents of owner-occupied units for the cost of repairing sidewalks. Fremont pays 50% of the cost for residential sidewalk repair when a sidewalk is damaged by a city-maintained tree.

Milpitas has not adopted a sidewalk ordinance. A conservative estimate of annual saving is \$50,000, even if the City exempted owner-occupied residential units from the responsibility to maintain sidewalks.

A second issue of concern with regard to the management of sidewalks are trip and fall claims. Sidewalk trip and fall claims are common. They typically involve small sums of money. However, it is not uncommon for an occasional trip and fall claim involving an elderly person to range up to \$200,000. Although state law permits cities to require that property owners maintain sidewalks, it does not specifically shift liability to the abutting property owners without clear legislative language. Again, some cities, including San Jose and Fremont, make it very clear in their municipal code that the property owner is liable to third parties who may suffer injury or damages as a result of the failure of the property owner to maintain the sidewalk in a safe and non-dangerous condition.

Since 2001, eight trip and fall claims related to sidewalk conditions have been filed against the City. The City was held financially responsible in five of these cases, the remaining three are pending. Adopting specific language to hold property owners responsible for third party injuries resulting from unsafe sidewalks will help the City avoid larger claims and will have a positive effect on the city's ability to reduce exposure to sidewalk liability. ABAG is encouraging its members to adopt such an ordinance and has prepared a model ordinance.

In light of the common policy of the cities of San Jose and Fremont, along with ABAG support, it is recommended that the Council direct staff to draft an ordinance to reduce the city's sidewalk maintenance and liability costs. The Citizen's Advisory Committee could review a draft ordinance for recommendation to City Council. Minimal staff time would be required to draft the ordinance or operating procedures that should be developed to accompany a new ordinance.

Attachment

c:

¹ It should be noted that under the 1911 Act an ordinance is not necessarily required to make property owners responsible for sidewalk maintenance. The Cities of Gilroy and Pacifica require property owners to maintain sidewalks without a specific ordinance. However, given the issue of liability, which follows, the adoption of an ordinance is felt to be a better course of action.

MEMORANDUM

Department of the City Attorney



To: Blair King, Assistant City Manager
From: John D. Bakker, Assistant City Attorney
Subject: Sidewalk Maintenance Responsibility and Liability of Abutting Landowners
Date: June 24, 2003

ISSUE: (a) Are the City's Municipal Code provisions clear that abutting property owners are responsible for maintaining the sidewalks abutting their property?

(b) Are the City's Municipal Code provisions clear that abutting property owners are liable to third parties injured as a result of the abutting property owner's failure to maintain the sidewalks?

CONCLUSION:

(a) No. The City has not adopted a so-called "sidewalk ordinance," which generally require abutting property owners to maintain the sidewalk. However, the 1911 Improvement Act permits the City to shift this responsibility to the property owners without adopting an ordinance.

(b) No. The City has not adopted an ordinance that purports to shift liability to property owners, as some cities have.

DISCUSSION: Our research did not disclose any specific municipal code provisions dealing with sidewalk maintenance. Chapter 2 of Title X of the Milpitas Municipal Code deals with the relative responsibilities between the City and abutting property owners for *maintaining street trees and other plantings* in the public right of way. However, our review of other provisions dealing with streets and sidewalks did not disclose any provisions dealing with sidewalk maintenance.

State Law, however, contains provisions dealing with the maintenance of sidewalks by abutting property owners. The Streets and Highways Code contains a chapter entitled "Maintenance of Sidewalks." (See Sts. & Hwys. Code, §§ 5600-5630.) Those provisions generally allow the City to require the adjacent property owner to maintain the sidewalk sufficient to prevent dangerous conditions on the sidewalk. (§ 5610.) "Sidewalk" is defined to include planter strips and other decorative facilities between the curb and the property line. (See § 5600.) Upon proper notice (§§5611-5614),¹ the provisions allow the City to repair the sidewalk (§ 5615) and

¹ The noticing provisions require the "superintendent of streets" to provide notice (by mail) to the property owner or occupant, generally twice (although posting the property can avoid a second notice), which specifies what work needs to be done, how, and with what materials.

seek reimbursement from the property owners. If the property owner fails to pay, the money owed becomes a lien on the property. (See § 5625.) (I do not believe the procedure laid out in the statute raises Proposition 218 issues.) Thus, under the Streets and Highways Code, the City may compel abutting property owners to maintain sidewalks free from dangerous conditions.

Although state law permits the City to compel abutting property owners to maintain sidewalks free of dangerous conditions, it does not specifically shift liability to the abutting property owners. Despite Streets and Highways Code section 5610, under the common law, cities, not property owners, are liable for injuries to third parties resulting from dangerous conditions on the sidewalk. (See *Williams v. Foster* (1989) 216 Cal.App.3d 510, 521.) This is because the courts have held that, in the absence of clear legislative language to the contrary, the abutting property owner's duty to maintain is owed only to the City and not to the public (*ibid*); therefore, under general tort-law principles the abutting property owner may not be held liable by a member of the public—absent some showing that a negligent action or omission of the landowner led to the injury.

The *Williams* court all but invited cities to enact ordinances that “expressly [make] abutting owners liable to members of the public for failure to maintain the sidewalk.” (See *id.* at p. 522.) Accordingly, a number of cities in California have enacted ordinances that shift liability to the abutting property owner. The ordinances generally provide that a property owner with an obligation to maintain and repair under Streets and Highways Code section 5610 “shall owe a duty to members of the public . . . to repair and maintain the sidewalk in a safe and non-dangerous condition.” (See, e.g., San Jose Mun. Code, § 14.16.2205.)

Such ordinances are potentially subject to challenge on a number of grounds, and it appears that some insurance companies are making a concerted effort to have such regulations declared unconstitutional or preempted by state law. For instance, San Jose's ordinance has been challenged, and the case is currently on appeal. (*Gonzales v. City of San Jose*, 6th Cir. Case No. H025030.) Although the potential for a challenge exists, the risks are not particularly great, since a test case is already pending, and since the City could simply repeal the ordinance if challenged to avoid the cost of defending a lawsuit. In addition, if the ordinance is enacted, some property owner's insurers may simply elect to indemnify upon the City's tender. Thus, enactment of a sidewalk ordinance could allow the City to shift liability to property owners.

Please let me know if you have questions.